Supreme Court, U. S.
FILED
JUL 27 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

NO. 75-1552

CLAUDIO CASTANEDA, SHERIFF,
Petitioner

v.

RODRIGO PARTIDA,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 26, 1976
CERTIORARI GRANTED JUNE 14, 1976

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

IN THE

Supreme Court of the United States

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CLAUDIO CASTANEDA, SHERIFF, *Petitioner*

v.

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NOTATION

The following items appear in appendices to the Petition for Certiorari at the pages noted and are not reproduced in this Appendix:

	Exhibit
Order Denying Writ of Habeas Corpus and Opinion of the United States District Court	"B"
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Judgment of the United States Court of Appeals for the Fifth Circuit	"C"
Order Denying Rehearing En Banc by the United States Court of Appeals for the Fifth Circuit	"D"

CLERK'S DOCKET ENTRIES

Appeal

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

74-B-59

C. Form No. 106A Rev.

TITLE OF CASE	ATTORNEYS
RODRIGO PARTIDA VS. CLAUDIO CASTANEDA, SHERIFF OF HIDALGO COUNTY	For plaintiff: DAVID G. HALL P.O. BOX 1493 SAN JUAN, TEXAS 78589 For defendant: THOMAS P. BEERY, Asst. District Attorney Hidalgo Coun Hidalgo County, Texas

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
5 mailed	Clerk		4/5/74	FORMA PAUPERIS		
			11/5/74	Notice of Appeal		
6 mailed	Marshal				5.00	
			11/15/74	C/D 2-10		5.00
s of Action: Petition Writ Of Habeas Corpus.	Docket fee					
	Witness fees					
on arose at:	Depositions					

BEST COPY AVAILABLE

DATE	PROCEEDINGS	Date Judgm
4/5/74	Leave To File Granted, But in this case only, Signed RGG and filed.	
4/5/74	Petition For Writ Of Habeas Corpus, filed.	1
4/5/74	Memorandum, filed. Signed RGG. c/c to District Atty. of Hidalgo Claudio Castaneda, and David Hall.	2
4/5/74	ORDER OF DISMISSAL, Signed RGG and filed. c/c to District Atty. of Hidalgo and Claudio Castaneda, and David Hall.	3
4/8/74	Petitioner's Application For Certificate Of Probable Cause, filed.	4
4/8/74	Petitioner's Notice Of Appeal, filed.	5
4/15/74	Memorandum And Order, filed. (recommended that Petitioner be released on his original bond or a similar bond until the Court has ruled on his writ of habeas corpus.) c/c mail to Attny General of Texas, District Attny of Hidalgo County, Sheriff of Hidalgo County and Mr. Hall. Hearing set for Friday, June 28, 1974 at 9:30 A.M.	6
5/13/74	Answer To Petition For Writ Of Habeas Corpus, filed.	7
5/17/74	Transcript and Supplemental Transcript of Proceedings Had and Statement of Facts in State Court, filed.	8
5/17/74	Second Supplemental Transcript, filed.	9
5/20/74	Pltf's Motion To Withdraw Notice Of Appeal; filed: M/D 6/10/74	10
6/11/74	Order To Withdraw Notice of Appeal, Signed RGG and filed. c/c to all counsel. jmb	11
6/28/74 6/28/74	Supplemental brief of respondent filed. Petitioner appears with attorney Daivd G. Hall for oral hearing on petition for writ of habeas corpus and under-representation of Mexican-Americans in the Grand Jury of Hidalgo County, Texas at 1:35 p.m. Stipulation entered into the record in ref: to attorney Joe I. Cardenas qualifications. Petitioner offers P-1 Affidavit of Joe Cardenas and P-2, (entire record of proceedings in State Court). Petitioner rests at 1:55 P.M. Respondent offers into evidence R-1, Answer to petitioner's complaint-Respondent's witnesses: 1. Jose Alamia-State District Judge, Hidalgo Co., Texas Oath is waived by all counsel. Mr. McInnis will search for transcript of proceedings of the Grand Jury which indicted Petitioner. Petitioner requests leave to file another brief-request is granted.	12

D. C. 115A Rev. Civil Docket Continuation

DATE	PROCEEDINGS	J
6/28/74	Breifs are to be filed by 8/5/74 and replied by 8/12/74. Petitioner requests a bond be set by this Court. Bond is set at $5,000.00	
7/2/74	Appearance Bond, filed.	1
7/29/74	Reporter Transcript of impanelling of the Grand Jury in 92th District Court, filed.	1
8/6/74	Petitioner's emorandum Brief In Support Of His Petition For Writ Of Habeas Corpus, filed.	1
8/12/74	"District Attorney Oscar McInnis informed the Court that his brief which is due today would be mailed today and the Court agreed to this instead of making them drive to Brownsville to file it this date. Clerk will advise counsel. Reynaldo G. Garza, U. S. District Judge." a/n iw and filed	1
8/14/74	Respondent's Second Supplemental Brief, filed.	1
8/15/74	Petitioner's Motion For Leave To File Reply Brief, filed. M/D 8/19/74	1
8/20/74	Order Granting Leave To File Petitioner's Reply Brief, Signed RGG, filed.	19
8/20/74	Petitioner's Reply Brief, filed.	2
10/26/74	Memorandum, Signed RGG, filed. (Petition for Writ of Habeas Corpus denied.)	2
10/26/74	Order Of Dismissal, Signed RGG, filed. cc w/memorandum to Petitioner, Hall & McInnis	2
11/5/74	Petitioner Notice Of Appeal, filed.	23
11/5/74	Petitioner Application For Certificate of Probable Cause, filed.	24
11/15/74	Stipulation For Temporary Retention Of Record In District Court, filed.	25
11/15/74	Petitioner-Appellant's Designation of Record For Appeal, filed.	2
	Petitioner's Motion 11/20/74 Proceed On Appeal In Forma Pauper	

DATE	PROCEEDINGS	Date Judgm
11/20/74	Certificate of Probable Cause, Signed RGG and filed. c/c to all counsel.	28
11/20/74	Order Granting Leave To Appeal in Forma Pauperis, Signed RGG and filed. c/c to all counsel.	29
11/22/74	Reporter's Transcript of Proceedings, filed.	30

TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, Clerk
BY [signature] Deputy Clerk

[5]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

C. A. NO. 74-B-50

RODRIGO PARTIDA,
Petitioner

v.

CLAUDIO CASTANEDA, Sheriff,
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

(Filed April 5, 1974)

Now Comes RODRIGO PARTIDA, hereinafter referred to as Petitioner, and represents to this Court that he is held and confined in the Hidalgo County Jail, at Edinburg, Texas by CLAUDIO CASTANEDA, Sheriff of Hidalgo County, in restraint of his liberty and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, in that:

I.

Petitioner was charged by indictment in Cause No. 11,597 in the 92nd Judicial District Court of Hidalgo County, Texas with the felony offense of burglary of a private residence at night with the intent to commit rape, and was convicted of such charge by a jury on December 19, 1972, and on February 16, 1973 Petitioner was sentenced by the said Court to serve not less than five (5) nor more than eight (8) years in the Texas Department of Corrections.

[6]

II.

Subsequently, Petitioner's court-appointed counsel for the trial of such cause withdrew as his attorney, and the 92nd Judicial District Court appointed David G. Hall as his counsel for the purpose of prosecuting an appeal in Cause No. 11,597.

III.

Thereafter the Petitioner appealed the conviction in said cause to the Court of Criminal Appeals of the State of Texas, the same being No. 47,743 on the docket of the Court of Criminal Appeals of the State of Texas.

IV.

The Court of Criminal Appeals of the State of Texas affirmed the judgment of the 92nd Judicial District Court of Hidalgo County, Texas in an opinion rendered on the 6th day of March, 1974, a copy of which opinion is attached hereto and incorporated herein by reference as

Exhibit A. On March 27, 1974, the Court of Criminal Appeals of the State of Texas denied your Petitioner leave to file his Motion For Re-Hearing in such cause.

V.

Upon said denial of his Motion For Leave To File Motion For Re-Hearing and the issuance of the mandate of the Court of Criminal Appeals of the State of Texas, a copy of which is attached hereto and incorporated herein by reference as Exhibit B, Petitioner was placed in custody in the Hidalgo County Jail, Edinburg, Texas, where he is now held.

[7]

VI.

Petitioner has exhausted all of his state remedies, and earnestly urges to this Court that unless it grants its Writ Of Habeas Corpus he will suffer irreparable injury in that he will, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, be taken to the Texas Department of Corrections at Huntsville, Walker County, Texas for incarceration and suffer hardships not contemplated by due process.

VII.

In each and every instance and each and every move above set out, Petitioner sought protection under the Fourteenth Amendment to the Constitution of the United States, and in all instances, raised, presented, and urged his federal constitutional questions relating to his conviction in the courts of the State of Texas.

VIII.

The conviction of Petitioner in the courts of the State of Texas was in denial of due process and equal protection in that the indictment and evidence produced on Petitioner's Amended Motion For New Trial showed the following: that the indictment in Cause No. 11,597 in the 92nd District Court of Hidalgo County, Texas was returned by the Grand Jury for the March Term, 1972 of that court; that at the time that the members of the Grand Jury for the March Term, 1972 were appointed the population of Hidalgo County, Texas was approximately 181,535 persons (United States Census of Population: 1970, Report PC(1)-C45-Texas, Table 119, p. 914); that of the foregoing total population 37,924 are persons with other than a Spanish surname and 143,611 are persons with a Spanish

[8]

surname (Census of Population: 1970, Report PC(1)-C45-Texas, Table 129, p. 1092); that virtually all of the persons bearing a Spanish surname in Hidalgo County are persons of Mexican descent; that approximately 79.2% of the population of Hidalgo County, Texas is of Mexican descent; that such persons of Mexican descent are citizens of the United States and of the State of Texas and fully meet the requirements of the Constitution and Laws of the State of Texas for service as grand jurors; that notwithstanding the qualifications of the persons of Mexican descent who live and reside in Hidalgo County, Texas, the grand jury commissioners of such county have selected 531 non-Spanish surnamed persons for potential service as grand jurors during the period from January 1,

1962 through March 17, 1972 and have selected only 339 persons bearing Spanish surnames during the same period; that only approximately 39.0% of the persons selected for potential service as grand jurors by the several grand jury commissions during the last ten years have been persons of Mexican descent; that the Grand Jury Commission empaneled for the purpose of selecting the Grand Jurors for the March, 1972 Term of the 92nd Judicial District Court, which Grand Jury returned the indictment in such cause, selected, named and appointed twenty (20) persons for potential service on such Grand Jury, ten (10) of whom were persons with other than a Spanish surname and ten (10) of whom were persons of Mexican descent; that such long-standing, continuing and systematic exclusion and underrepresentation of Mexican-Americans from the list of grand jurors drawn by the several grand jury commissions is based upon the wholly irrelevant classification of their

[9]

national origin contrary to and in violation of the Constitution and Laws of the United States and of the State of Texas; that such exclusion and underrepresentation of Mexican-Americans from grand jury service upon the arbitrary and unreasonable basis of their national origin has been and is invidiously discriminatory against an identifiable class or group and denies to your Petitioner, a person of Mexican descent, the equal protection and due process of law; that the denial to Petitioner of his right to equal protection in the composition of the grand jury of Hidalgo County, Texas, is a denial of a fundamental right which may be raised for the first time on his Motion For New Trial in the convicting court; that Defendant did not know-

ingly and intentionally waive his right to challenge the composition of the grand jury, for the reason that he was never informed by his court-appointed trial counsel, Mr. Joe Cardenas, that such right existed, as more fully appears from the affidavit of Petitioner attached to his original Motion for New Trial, which appears in the original record developed in the proceedings in the state courts, and the further affidavit of your Petitioner, Rodrigo Partida, attached to Petitioner's original Motion For New Trial, which is also contained in the record in Cause No. 11,597 in the state court.

IX.

A full and complete factual record was developed by the 92nd Judicial District Court of Hidalgo County, Texas upon the hearing held on Petitioner's Amended Motion For New Trial on June 28, 1973, and the existence and availability of such record obviates the necessity of an additional evidentiary hearing before this Court.

[10]

X.

Petitioner was free on bail of $5,000 pending appeal to the Court of Criminal Appeals of the State of Texas, and prays that pending the hearing on this writ he be freed on bail in the sum of $5,000, or such other amount as this Court may deem reasonable and just.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that a Writ of Habeas Corpus issue to the Hon. Claudio Castaneda, Sheriff of Hidalgo County, Texas, commanding him to produce the person of Petitioner before Your

Honor, at a time and place certain, and to show cause, if any he has, why he is so illegally holding him in restraint of his liberties; and in the meantime, that bail be fixed in accordance with the pleadings here presented.

Respectfully submitted,

RODRIGO PARTIDA
Rodrigo Partida, Petitioner

STATE OF TEXAS §
§ VERIFICATION
COUNTY OF HIDALGO §

Before me, the undersigned Notary Public in and for Hidalgo County, Texas, personally appeared RODRIGO PARTIDA, Petitioner in the above entitled and numbered cause, and upon being here and now duly sworn, deposes and says that he has read the foregoing Petition For Writ Of Habeas Corpus, that he is familiar with the contents thereof, and that all things therein are true and correct. Signed the 2nd day of April, 1974.

S. FERNANDEZ
Notary Public in and for
Hidalgo County, Texas

My commission expires
June 1, 1975.

[11]

MEMORANDUM AND ORDER

(Caption Omitted)

(Filed April 15, 1974)

On April 5, 1974, this Court filed its Memorandum and Order of Dismissal in the above entitled and numbered cause, in which Petitioner Rodrigo Partida sought a writ of habeas corpus.

David G. Hall, an attorney for the American Civil Liberties Union, has called attention to the Court to the case of *Muniz v. Beto,* 434 F.2d 697 (5th Cir. 1970). Under the authority of that case, this Court now finds that it should not adopt the findings of fact and conclusions of law expressed in the opinion of the Court of Criminal Appeals, since Petitioner, in his State writ of habeas corpus petition, presented sufficient evidence to shift the burden of proving a systematic under-representation of Mexican-Americans in the Grand Juries of Hidalgo County, Texas, on the State of Texas.

Therefore, this Court is withdrawing its Memorandum of April 5, 1974, and setting aside its Order of Dismissal and re-instating this cause of action.

The Clerk will send copies of Petitioner's application for the writ to the Attorney General of the State of Texas, the

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District Attorney of Hidalgo County, Texas, and Sheriff Claudio Castaneda of Hidalgo County, Texas, who will

within thirty (30) days file an answer and a transcript of all proceedings had in the case of Rodrigo Partida.

A hearing is hereby set to receive evidence for Friday, June 28, 1974, at 9:30 a.m.

It is recommended to the District Attorney and the Sheriff of Hidalgo County that Petitioner Rodrigo Partida be released on his original bond or a similar bond, until this Court has ruled on his Petition for writ of habeas corpus. If this suggestion is not followed, the attorney for the Petitioner can seek further relief from this Court in this regard.

A copy of this Order shall be served by the Clerk with a copy of the Petition for writ of habeas corpus.

DONE at Brownsville, Texas, this 15th day of April, 1974.

REYNALDO G. GARZA
Reynaldo G. Garza
United States District Judge

[13]

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

(Caption Omitted)

(Filed April 16, 1974)

To The Honorable Judge Of The United States . . . . . District Court For The Southern District Of Texas:

In response to your Honor's Writ of Habeas Corpus, I respectfully state that it is true that I have in my custody and under my restraint the said Rodrigo Partida, according to the statement in his Petition. I took and now have the said Rodrigo Partida by virtue of the Mandate of the Court of Criminal Appeals of the State of Texas, issued March 29, 1974, a certified copy of which is attached hereto as a part of this Answer and marked "Exhibit A". I also now bring before your Honor, in obedience to your Honor's order, the person of the said Rodrigo Partida.

CLAUDIO CASTANEDA
Claudio Castaneda, Sheriff of
Hidalgo County, Texas

SWORN TO AND SUBSCRIBED BEFORE ME this the 7th day of May, 1974.

LINDA E. JACKSON
Notary Public in and for
Hidalgo County, Texas

[14]

"EXHIBIT A"

THE STATE OF TEXAS,

TRIAL COURT NO. 11597

THE STATE OF TEXAS

TO THE 92nd. Judicial District Court of Hidalgo County — GREETING:

Before our COURT OF CRIMINAL APPEALS, on the 27th day of March A.D. 1974, the cause upon appeal to revise or reverse your Judgment between Rodrigo Partida, Appellant, No. 47,743 v. The State of Texas, Appellee, was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

Leave to file appellant's motion for rehearing denied.

WHEREFORE, we command you to observe the order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. JOHN F. ONION, JR., Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 29th day of March A.D. 1974.

GLENN HAYNES, Clerk

[15]

HIDALGO COUNTY GRAND JURY PANELS, 1962-1972

Term of Court	Spanish-Surname Jurors	Non-Spanish Surname Jurors	Total
1962			
January	3	13	16
March	6	10	16
May	7	9	16
September	7	9	16
November	7	9	16
1963			
January	7	9	16
March	6	10	16
May*	—	—	—
September	7	9	16
November	3	13	16
1964			
January	4	12	16
March*	—	—	—
May	6	10	16
September	2	14	16
November	7	9	16
1965			
January	5	11	16
March	5	12	17
May	5	11	16
September	4	12	16
November	6	10	16
1966			
January#	—	—	—
March	6	14	20
May	8	12	20
September	8	12	20
November	8	12	20
1967			
January	9	11	20
March	6	15	21
May	4	16	20
September	10	10	20
November*	—	—	—

1968			
January	6	14	20
March	8	12	20
May	6	14	20
September	5	15	20
November	8	12	20
1969			
January	7	13	20
March	11	9	20
May	9	11	20
September	8	12	20
November	15	5	20
1970			
January	7	13	20
March	7	13	20
May	7	13	20
September*	—	—	—
November	11	9	20
1971			
January	8	12	20
March	3	17	20
May	11	9	20
September	11	9	20
November	14	6	20
1972			
January	11	9	20
March	10	10	20
TOTALS:	339, 39.0%	531, 61.0%	870, 100%

* Venire facies not issued and/or envelope not opened
\# Jury Commission not appointed and panel not selected

EXHIBIT A

[16]

DEFENDANT'S EXHIBIT NO. 2

TABLE 1: Median Texas Family Income, By Race

Source: 1970 Census of Population: General Social and Economic Characteristics of Texas, Table 58, Report No. PC(1)-C45, p. 451

*White	$8930
Negro	5334
Spanish language or Spanish surname	5897
TOTAL	8490

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DEFENDANT'S EXHIBIT NO. 3

TABLE 3: Level of School Completed By Texans 25 Years Old And Over, By Race

Source: 1970 Census of Population: General Social and Economic Characteristics of Texas, Table 51, Report No. PC(1)-C45, p. 439

	*White	Black	Spanish lang. or surname	Total Pop.
Less than 5 years elementary school	8.6%	14.6%	33.8%	9.3%
Less than 1 year high school	28.6%	43.6%	61.9%	30.2%
4 years high school or more	49.5%	30.1%	24.7%	47.4%

* The category "White" includes persons of Spanish surname or language.

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DEFENDANT'S EXHIBIT NO. 4

TABLE 2: Texas Families With Income Less Than Poverty Level, By Race

Source: 1970 Census of Population: General Social and Economic Characteristics of Texas, Table 58, Report No. PC(1)-C45, p. 453

*White	12.4%
Negro	32.7%
Spanish language or Spanish surname	31.4%
TOTAL	14.6%

* The category "White" includes persons of Spanish surname or language.

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DEFENDANT'S EXHIBIT NO. 5

TABLE 4: Occupation Of Employed Texans 16 Years Old And Over, By Race, Report No. PC(1)-C45, p. 445

Source: 1970 Census of Population: General Social and Economic Characteristics of Texas, Table 54

	*White	% of White	Negro	% of Negro	Spanish-language, or surname	% of Spanish
Professional, technical & kindred	558,269	15%	34,208	7%	45,411	7%
Managers & administrators, except farm	337,334	9%	10,004	2%	30,232	5%
Laborers, except farm	147,079	4%	53,901	11%	52,372	9%
Farm laborers & farm foremen	70,202	2%	10,764	2%	35,093	6%
Service workers, except private household	343,007	9%	113,336	20%	82,712	14%

* The category "White" includes persons of Spanish surname or language.

[20]

DEFENDANT'S EXHIBIT NO. 6

TABLE 5: Families in McAllen-Pharr-Edinburg SMSA With Incomes Less Than Poverty Level, By Race

Source: Computed from 1970 Census of Population: General Social and Economic Characteristics of Texas, Tables 90, 101. Report No. PC(1)-C45, pp. 598, 741

According to census data, 52.8% of Spanish-language or surname families in the McAllen-Pharr-Edinburg SMSA have income less than poverty level. The corresponding proportion of non-Spanish families is 13.7%.

[21]

DEFENDANT'S EXHIBIT NO. 7

TABLE 6: Level Of School Completed By Males 25 Years Old And Over in McAllen-Pharr-Edinburg SMSA, By Race

Source: Computed from 1970 Census of Population: General Social and Economic Characteristics of Texas, Tables 83, 97. Report No. PC(1)-C45, pp. 507, 689

	Spanish surname or language	Spanish % of	*Non-Spanish	% of Non-Spanish
8 years or less	18,774	73%	2,598	23%
1-4 years high school	4,831	18%	4,738	42%
1-3 year college	1,061	4%	1,832	16%
4 years college or more	971	3%	2,053	19%

* "Non-Spanish" was computed by subtracting "Spanish-surname or language" from total population. Since there are only 97 Negroes included (Table 91), this category is almost completely White.

[22]

DEFENDANT'S EXHIBIT NO. 8

TABLE 7: Occupation Of Employed Persons in McAllen-Pharr-Edinburg SMSA, By Race

Source: Computed from 1970 Census of Population: General Social and Economic Characteristics of Texas, Tables 86, 99. Report No. PC(1)-C-45, pp. 715, 546

	Spanish-language or surname	% of Spanish	*Non-Spanish	% of Non-Spanish
Professional technical & kindred	2,613	7%	3,249	22%
Managers & administrators, except farm	1,988	5%	2,448	17%
Laborers, except farm	2,666	7%	483	3%
Farm laborers & farm foremen	6,584	18%	527	3%
Service workers, except private household	3,762	10%	783	5%

* "Non-Spanish" was computed by subtracting "Spanish surname or language" from total population. Since there are only 119 Negroes included (Table 93), this category is almost completely White.

[23]

DEFENDANT'S EXHIBIT NO. 9

TABLE 8: Value of Owner-Occupied Houses in McAllen-Pharr-Edinburg SMSA, By Race

Source: Computed from 1970 Census of Housing: Metropolitan Housing Characteristics, McAllen-Pharr-Edinburg, Texas, Tables 1, 19 Report No. HC(2)-129, pp. 1, 10

Value of House	Spanish language or surname	% of Spanish	*Non-Spanish	% of Non-Spanish
Less than $5,000	9,279	49%	734	10%
$5,000-$19,999	9,219	48%	5,143	68%
$20,000 or more	517	3%	1,641	22%

* "Non-Spanish" was computed by subtracting "Spanish surname or language" from total population. Since there are only 100 Negro families in the area (Table 95), this category is almost completely White.

[24]

DEFENDANT'S EXHIBIT NO. 10

TABLE 9: Gross Rent Of Renter-Occupied Housing Units in McAllen-Pharr-Edinburg SMSA, By Race.

Source: Computed from 1970 Census of Housing: Metropolitan Housing Characteristics, McAllen-Pharr-Edinburg, Texas, Tables 2, 20. Report No. HC(2)-129, pp. 2, 11

Rent	Spanish language or surname	% of Spanish	*Non-Spanish	% of Non-Spanish
No cash rent	2,129	25%	303	8%
Less than $50	3,733	45%	481	13%
$50 to $149	2,450	29%	2,063	57%
$150 or more	99	1%	798	22%

* "Non-Spanish" was computed by subtracting "Spanish surname or language" from total population. Since there are only 100 Negro families in the area (Table 95), this category is almost completely White.

[25]

ORDER OF DISMISSAL

(Caption Omitted)

(Filed October 26, 1974)

For the reasons stated in the Memorandum entered this date, it is

ORDERED, ADJUDGED and DECREED that the Petition for Writ of Habeas Corpus should be, and the same is hereby, denied, and this cause is hereby dismissed.

The Clerk will send copies of this Order and the attached Memorandum to the Petitioner, his counsel, and to the Criminal District Attorney of Hidalgo County, Texas.

DONE at Brownsville, Texas, this 26th day of October, 1974.

REYNALDO G. GARZA
Reynaldo G. Garza
United States District Judge

[26]

NOTICE OF APPEAL

(Caption Omitted)

Notice is hereby given that RODRIGO PARTIDA, Petitioner in the above entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order dismissing his Petition For Writ Of Habeas Corpus, entered in this proceeding on October 26, 1974.

Dated: November 4, 1974.

DAVID G. HALL
American Civil Liberties Union
Foundation—South Texas Project
P. O. Box 1493
San Juan, Texas 78589
512/787-8171
Attorney for Petitioner

[27]

OSCAR B. McINNIS
Criminal District Attorney
Hidalgo County, Texas

July 25, 1974

Hon. Reynaldo Garza, Judge
United States District Court
Southern District of Texas
Brownsville Division
Brownsville, Texas 78529

RE: Writ of Habeas Corpus
Rodrigo Partida v.
Claudio Castaneda, Sheriff
Civil Action No. 74-B-50

Dear Judge Garza:

As per your request at the recent hearing on the Writ of Habeas Corpus in the above case, I am enclosing herewith a copy of the transcript of the proceedings had when the Grand Jury was impanelled which indicted the Petitioner. In addition thereto, I have attached to the transcript a copy of the Grand Jury list, together with the Sheriff's return thereon. This list has a number of notations on it which pretty well explain why more Mexican-Americans were not on the Grand Jury since several appeared on the original list. Three living in rural areas were not located and the fourth was out of the State. It Appears from the list that the three who were excused were Anglo-Americans. Two of those were excused by the Court before the appearance day and the third, Mr. Faulkner, was excused on the day the Grand Jury was impanelled. The only Mexican-American who mentioned being excused was Mr. Calvillo who, after some discussion with the Court, agreed to serve.

You will note that the list of Grand Jurors contained no street addresses. This has now been corrected. As a result, those placed on the list are now generally located. At any rate, there is nothing in this record to indicate that any discriminatory practices were exercised by anyone in the selection and impanelling of the Grand Jury.

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I am filing the original of the attached transcript with the Clerk of your Court and requesting that it be made a part of the record in the case.

Very truly yours,

OSCAR B. McINNIS
Oscar B. McInnis
Criminal District Attorney
Hidalgo County, Texas

OBM: lr
Encs.
cc: Hon. David Hall
Attorney at Law
P. O. Box 1493
San Juan, Texas 78589

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(Reporter's Note: The following is the impaneling of the Grand Jury held on the 16th day of March, 1972, for the March term, before the Hon. J. R. Alamia, Judge of the 92nd District Court, Hidalgo County, Texas, and the following proceedings were had, to-wit:)

The Court: It looks like we only have thirteen according to the report of the Clerk, and we are supposed to have fourteen present outside of those that were not served and those that were excused because of emergencies. Now, there is only one gentleman that should be here and is not, and perhaps he lives away out in Sullivan City, according to the list, and so, we are not going to wait for him. We have enough to impanel a Grand Jury. Madam Clerk, swear the panel in. Do you have the oath there?

Mrs. McMillon: Yes, sir. Please rise. You and each of you solemnly swear that you will make true answers to such questions as may be propounded to you by the Court or under its direction touching your service and qualifications as a Grand Juror so help you God?

(Reporter's Note: All jurors answered in the affirmative)

The Court: Be seated, please. Are you and each of you a citizen of this State and County and qualified to vote in this county under the constitution and laws of the State of Texas.

(Reporter's Note: All jurors answered in the affirmative.)

The Court: Now, eighteen year olds are also

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qualified to vote, however, the Attorney General tells us that they are not qualified to sit on the jury as yet, and that also includes Grand Juries, and if we have any eighteen year olds, between eighteen and twenty-one, they are qualified to vote but otherwise are not qualified to sit on the jury, and I assume that we do not have any. All right. Now, are you and each of you able to read and write the English language? If there is anyone that is not, please indicate to the Court now. Now, the next two questions that the Court is going to ask you — Of course, I don't believe it will apply to anyone, but should it apply to you, and the Court is not aware of it if it does, but you may convey this information to the Court in private. The questions are as follows: Have you ever been convicted of a felony, and the next question is, are you under indictment or legal accusation for theft or for any felony? And, as I stated, if these questions apply to any of you, you may indicate this to the Court in private. All right. Now, having indicated by your silence that you had a positive answer to all of the questions or a negative answer to those that should be negative, and that you are qualified, the Court will excuse one of you, because we don't need but twelve and we have thirteen, apparently, so the Court will excuse one and naturally will excuse that person that has the most urgent emergency or reason for wanting to be excused, and if you have any such reason, you may indicate it to the Court now. Anyone that feels like they should be excused from Grand Jury service may say so at this time.

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Grand Juror, Mr. Faulkner: Judge, I am a druggist, pharmacist, and on call.

The Court: And, your name?

Grand Juror, Mr. Faulkner: Faulkner.

The Court: I am sorry. Is there anyone else that feels like they should be excused?

Grand Juror, Mr. Calvillo, Jr.: The only thing that I have pending is next week and that is, my father would have heart surgery in Houston and I would like to be gone that particular week. Other than that, I don't have any other thing.

The Court: You told the Court that over the telephone and I asked that you be present. Now, for the benefit of the jurors I might explain to you that being on the Grand Jury is not like a regular petit jury. The Grand Jury sets its own time and hours on days when they want to work. Once you are impaneled you are your own bosses. Now, your foreman can excuse you, or excuse as many as three for any particular reason during any of your deliberations. He must, however, retain a quorum of nine, and naturally, if you have some legitimate reason why you want to be excused during that particular session, you can ask permission of the foreman and he can excuse you. So, that is also one of the privileges that you have as a Grand Juror that you wouldn't have as a Petit Juror, because in a regular Petit Jury you have got to have twelve present and voting at all times and the verdict must be unanimous according to our laws. Now, the Grand

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Jury works a little different. You must have at least nine voting on the bill. And, so, with that explanation, what do you think, Mr. Calvillo? Do you think you can stay?

Grand Juror, Mr. Calvillo, Jr.: I will be glad to serve if I can make some kind of arrangement at that time.

The Court: Now, when is your father having surgery?

Grand Juror, Mr. Calvillo, Jr.: His surgery is scheduled the 22nd at Eight A. M.

The Court: That will be next week.

Grand Juror, Mr. Calvillo, Jr.: Yes, sir.

The Court: You will want to leave ahead of time, naturally, so, how early would you have to leave?

Grand Juror, Mr. Calvillo, Jr.: I would want to be there at least ahead of time, and then, depending on the outcome of the operation as to how long I would want to stay afterwards. I would like to stay there a day or two after that.

The Court: That would mean that you wouldn't be here from Tuesday on through the next week?

Grand Juror, Mr. Calvillo, Jr.: Yes, sir.

The Court: I dare say that — Well, I am not going to try to anticipate just how long the Grand Jury is going to work, because really I don't know. The District At-

torney compiles the load or the number of cases that will be presented to the Grand Jury and I have no way of knowing how many cases he has or how long it will take you to dispose of those cases. That is up to you, because you are your own bosses. So, it is between

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you and Mr. Faulkner. Whoever has the most urgent excuse.

Grand Juror, Mr. Faulkner: Of course, I don't know when I would be called. We own the drug store.

The Court: You are on active duty all the time?

Grand Juror, Mr. Faulkner: Well, semi-active. Will this jury start today?

The Court: The jury starts working today and it may work just this morning, and then, you can say, "Look, boys, we are going to quit and go on home". It is up to you. Of course, you will want to work as long as you are needed, naturally, but you can set your own hours. I really believe, Mr. Calvillo, if you stay that you can be excused during that part of the week.

Grand Juror, Mr. Calvillo, Jr.: All right. That is the way I felt because of the situation and that is the reason I advised the Court previously, and subject to being excused in the event I am called out of town, I will probably be able to get excused.

The Court: How long ahead of time will you know when your case is coming up, Mr. Wallace?

Grand Juror, Mr. Wallace, Jr.: That, I can't say.

The Court: Well, won't the lawyers tell you ahead of time?

Grand Juror, Mr. Wallace, Jr.: Yes, sir, I am sure they will.

The Court: Then, you are in a position where you

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can tell the jury, "Well, look, my case is coming up on the 20th of next month and I would like to be excused".

Grand Juror, Mr. Wallace, Jr.: That is correct.

The Court: By the way, gentlemen, your term is for a period of two months, so you work during the month, and part of the month of March is already overwith, and your term will expire during the latter part of April. Really, the first Monday in May. And, the new term starts then and we will have another Grand Jury after that. Now, the only exception to that is that maybe — Now, I am not saying that this happens, and it hasn't happened in this county except — Well, I don't remember when it has happened, but it could happen, and that would be that you get involved in some lengthy investigation that would justify the Grand Jury requesting the Court to extend your term, which the Court can do at your request. If that would happen, if you were to get involved in some investigation that would justify a lengthy investigation and extend your term ,then, of course, the Court would certainly do it, but that is the only way that your

term can be extended and that is by special request and special permission of the Court. Otherwise, your term will end in April and a new Grand Jury will take over in May. All right. Then, I am going to excuse Mr. Faulkner. You will be excused, sir. All right. Please call out the names of the rest, Madam Clerk.

Mrs. McMillon: As I call your names, please take your seat over here in the jury box. R. R. Cabaza, Jr., Ernest Serviere, Janice R. Holman, Oscar Trevino,

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Rupert Richards, Richard J. Geres, Jose Calvillo, Jr., Grady Bennett, Richard Cortez, Mrs. Scott Toothaker, Richard Martinez, Jr., H. W. Wallace, Jr.

The Court: Do you have the oath?

Mrs. McMillon: No, sir.

The Court: Please rise and take the oath. "You solemnly swear that you will diligently inquire into, and true presentment make, of all such matters and things as shall be given you in charge; the State's counsel, your fellows and your own, you shall keep secret, unless required to disclose the same in the course of a judicial proceeding in which the truth of falsity of evidence given in the grand jury room, in a criminal case, shall be under investigation. You shall present no person from envy, hatred or malice; neither shall you leave any person unpresented for love, fear, favor, affection or hope or reward; but you shall present things truly as they come to your knowl-

edge, according to the best of your understanding, so help you God".

(Reporter's Note: All Jurors answered in the affirmative)

The Court: Be seated, please. All right. Lady and gentlemen—Ladies and gentlemen. I thought I had only one there for a while, but I see two of you. The instructions that the Court will give you will be general in form. If you should seek, or if you should feel that you need further instructions or further advice, you can either seek it from the District Attorney, or whoever will be assisting the District Attorney, or if you see fit and you want to, you can seek any advice or answer to any questions or problems that you might have

from the Court by coming into the courtroom in a body or by request. All right. The general instructions are as follows: Inquire diligently into all offenses of grade of felony of which any of the Grand Jurors may have knowledge, or of which they may be informed by the State's attorney, or any other credible person. Ordinarily you will not need to examine into misdemeanors, although you may do so. No one may be put to trial in this State for an offense of the grade of felony, one which may be punished by death, or by confinement in the penitentiary, except upon a true bill of indictment charging such person with such offense. It is not your function to try the guilt or innocence of an accused; but to ascertain first if there has been committed an offense, then, whether some person is probably guilty of such offense, or would likely be

found guilty if put to trial before a petit jury. Guilt or innocence is the province of a petit jury. In such cases the accused is entitled to representation by counsel, to be confronted by the State's witnesses, to present his own witnesses, to have the case supervised by the trial Court and to have the Court charge the jury upon the law of the case. You will not lightly bring a charge by indictment against a citizen. It carries opprobrium and a stigma. On the other hand you will not hesitate to bring an indictment for this reason if you believe some person is probably guilty, or would likely be found guilty by a petit jury when put to trial according to law. Your deliberations are secret. You will recall that your oath requires you to keep the State's Counsel, your fellows' and your own secret unless required to disclose the same in a judicial proceeding in proper cases.

When deliberating upon voting an indictment, or when taking the vote, none but grand jurors may be present. Neither State's attorney, nor bailiff, nor witness, nor any other person may be present in your room at such time. You may consult the State's attorney from time to time during your proceedings, seeking his advice, his aid in examining witnesses, his services in presenting indictments in proper form after you have voted same, and so forth. You may seek advice of the Court touching any matter before you, but for this purpose, you must go into Court in a body, but you be careful not to divulge the particular accusation that is pending before you. It might be concerning burglary, for instance, but not about any particular burglary. Or, you may propound your question

in writing, and in such case, the Court may give answer in writing. The foreman shall preside. May appoint one or more clerks. The foreman may issue summons, or attachment for witnesses. The foreman will give the oath to each witness before questioning him. The foreman will sign all indictments voted by the Grand Jury. A quorum is nine Grand Jurors. Nine jurors must concur in voting an indictment. In voting an indictment, you will furnish the State's Attorney the necessary data for him to prepare the indictment. All indictments will be delivered by the Foreman to the Judge in open Court. At least nine members of the Grand Jury must be present on such occasion. You may meet and adjourn by majority vote, but you must not adjourn for longer than three days, except by consent of the Court. When you have finished your business

for the present, the Court may recess you for the remainder of this term for recall should business require it. The Court is going to appoint Mr. Oscar Trevino of Edinburg as your Foreman. Now, Ladies and Gentlemen of the Jury, at the last session of the last Grand Jury, the Grand Jury made an informal report to the Court in the form of three reports. Hand written. Those reports were given to the Court at that time and I asked the Foreman whether or not these reports should be made public and they indicated at that time that they were not to be made public. However, later on the Foreman communicated to this Court the fact that they could be at the option of the Court. Now, two of these—there were three, as I am telling you. Two of these reports involve matters which

the Court felt should be further investigated by another Grand Jury, which is this Grand Jury. And, for that reason, the Court did not make them public. I am handing you these two reports now, Mr. Foreman, so you may take it up with your Grand Jury and deliberate on it and make whatever report or investigation the Grand Jury sees fit. Now, you may, of course, again consult with the District Attorney and he will so advise you. Now, the third report—Mr. Bailiff, will you hand the Foreman the report? The third one had to do with some suggestions that they had for the police departments over the county and the Court, rather than make the suggestions public, will refer these suggestions to the Chief of Police of each incorporated city in our county. It didn't have reference to any particular police department. It was just a general suggestion that they should follow, or suggestions, rather. And, I am going

to mail today to each Chief of Police of each incorporated city in our county a copy of this report for their examination and their action. And, of course, if they want to make it public, why, they can do so. Actually, it is just suggestions and I feel that they will follow them, but that is what the Court has done with all three of these reports that the past Grand Jury referred to us. Two are being referred to you now for further action and the last one is, as I stated, being given to the Chief of Police of the incorporated cities of the county. Now, Ladies and Gentlemen, you may begin your deliberations. The Bailiff will show you to your quarters. Please, both of you, let's

swear you in at this time. Mr. Friend, you are representing the District Attorney's Office?

Mr. Friend: Yes, sir.

The Court: This is Mr. Joe Friend, the Assistant District Attorney. Over here on my right is Mr. John Singleterry, one of the Bailiffs of this Court. And, Mr. John Brewster, the Bailiff of the Court. And, over here is Mrs. Lupita McMillon, a Deputy District Clerk. And on my left is our Court Reporter, Ray Eaves. Now, if the Bailiffs will step forward and take the oath. Please raise your right hands. "You solemnly swear that you will faithfully and impartially perform all duties as bailiff of the Grand Jury and keep secret the proceedings of the Grand Jury, so help you God"?

Mr. Singleterry: I do.

Mr. Brewster: I do.

The Court: Gentlemen, you may escort the Grand Jury to their quarters and I am sure that the District

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Attorney's office will be there promptly to assist you.

(Reporter's Note: Whereupon the Grand Jury left the Courtroom)

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CERTIFICATE

STATE OF TEXAS :

COUNTY OF HIDALGO :

I, Edward R. Eaves, Official Court Reporter of the 92nd Judicial District Court of Hidalgo County, Texas, at the time in question, do hereby certify that the foregoing pages number 1-12, inclusive, constitutes a true, full and correct transcript of my machine shorthand record made at the Impaneling of the Grand Jury on March 16th, 1972, before the Hon. J. R. Alamia, Judge of said Court.

In testimony whereof, I hereto set my Official Hand in Edinburg, Texas, this the 23rd day of July, A. D., 1974.

EDWARD R. EAVES
Edward R. Eaves, Official Court Reporter, Hidalgo County, Texas.

Three Hundred Form

THE STATE OF TEXAS

I, K. C. Boysen, Clerk of the District Court of Hidalgo County, Texas, on this 9th day of March 19 72, within thirty days of the day designated by the Honorable Judge of said Court on which the Grand Jury is to be impaneled, having opened the envelope delivered to me by the Honorable J. R. ALANIA District Judge of the 92nd Judicial District, embracing said County, containing the list of Grand Jurors selected by the Jury Commissioners of said County for the said term of Court, do, from said list, make the following copy of the names of persons so selected as Grand Jurors, to-wit:

1 R. R. CABAZA, JR., WESLACO	11 GRADY BENNETT, EDINBURG
2 ROBERT MANNING, EDINBURG	12 ALICIA GARZA, LA JOYA
3 DIEGO GARZA SULLIVAN CITY	13 ADOLPH WESTERMAN, MC ALLEN
4 ERNEST SERVIERE, MC ALLEN	14 RICHARD CORTEZ, WESLACO
5 JANICE R. HOLMAN, MC ALLEN	15 ALFREDO GARZA, EDINBURG
6 OSCAR TREVINO, EDINBURG	16 MRS. SCOTT TOOTHAKER, MC ALLEN
7 ADELA BAZAN, SULLIVAN CITY	17 RICHARD MARTINEZ, SR., MC ALLEN
8 RUPERT RICHARDS, MC ALLEN	18 HORACIO GARZA, SULLIVAN CITY LA JOYA
9 RICHARD J. GERES, MC ALLEN	19 D. A. FAULKNER, MC ALLEN
10 JOSE CALVILLO, JR., WESLACO	20 H. W. WALLACE, JR., WESLACO

THE STATE OF TEXAS,
County of HIDALGO } I, K. C. BOYSEN Clerk of the District Court of said County, do hereby certify that the above list is a correct copy of the list of names selected by the Jury Commissioners as Grand Jurors for the next term of the District Court to be begun and holden in and for the County of HIDALGO, State of Texas, on the 16th day of March 19 72

Witness my hand with the seal of said Court attached this the 9th day of March 19 72

K. C. BOYSEN

Clerk of the District Court of HIDALGO County, Texas.

By ____ Deputy.

To the Sheriff or Any Constable of HIDALGO *County, Texas:*

You are hereby commanded to summon each of the foregoing named twenty persons to be and appear before the District Court of HIDALGO County, at the Courthouse in EDINBURG, TEXAS, on the 16th day of March A. D. 19 72, at 9:30 o'clock A. M., then and there to serve as Grand Jurors for the MARCH Term, 19 72, of the District Court of HIDALGO County.

HEREIN FAIL NOT, And of this writ make due return as the law directs.

WITNESS K. C. BOYSEN Clerk of the District Court HIDALGO County.

Given under my hand and seal of said Court, at office in EDINBURG, TEXAS this 9th day of March A. D. 19 72.

K. C. BOYSEN, Clerk

District Court HIDALGO County, Texas.

By ____ Deputy.

THE STATE OF TEXAS,
County of Hidalgo } I, Claudio Castaneda Sheriff of Hidalgo County, Texas, do hereby certify that the within and foregoing list of Grand Jurors came to hand on the 10th day of March A. D. 1972 at 10:00 o'clock A. M., and was executed by me as follows, to-wit: By giving personal notice on the respective dates following each name, to each of the following named Jurors of the time and place when and where he was to attend as a Grand Juror, viz:

NAME	DATE OF SERVICE Year	Month	Day	Hour	NAME	DATE OF SERVICE Year	Month	Day	Hour
1 R. R. Cabaza Jr.	1972	3	11	1:00 PM	11 Grady Bennett	1972	3	10	4:15 PM
2 Robert Manning	1972	3	10	4:15 PM	12				
3					13				
4					14				
5					15				
6 Oscar Trevino	1972	3	11	12:00 PM	16 Mrs. Scott Toothaker	1972	3	10	3:30 PM
7					17				
8					18				
9 Richard J. Geres	1972	3	10	4:00 PM	19 D. A. Faulkner	1972	3	11	9:00 AM
10 Jose Calvillo Jr.	1972	3	11	1:00 PM	20 H. W. Wallace Jr.	1972	3	11	1:30 PM

By leaving at the respective places of residence, and with a member of his family over sixteen years old, on the date following each name, a written notice to the following named Jurors that each of them had been selected as a Grand Juror, and the time and place when and where he was to attend, to-wit:

NAME	DATE OF SERVICE Year	Month	Day	Hour	NAME	DATE OF SERVICE Year	Month	Day	Hour
1					11				
2					12				
3					13 Adolph Westerman	1972	3	10	4:00 PM
4 Ernest Serviere	1972	3	10	3:30 PM	14 Richard Cortez	1972	3	11	1:00 PM
5 Janice R. Holman	1972	3	10	3:30 PM	15				
6					16				
7	-		-		17 Richard Martinez Sr.	1972	3	10	9:45 PM
8 Rupert Richards	1972	3	11	2:00 PM	18 Horacio Garza	1972	3	11	5:00 PM
9					19				
10					20				

By mailing by registered mail, as directed by the Honorable Judge of said District Court, to the respective places of residence on the date following each name a written notice to the following named Jurors that each of them had been selected as a Grand Juror and the time and place when and where he was to attend, to-wit:

NAME	DATE OF SERVICE Year	Month	Day	Hour	NAME	DATE OF SERVICE Year	Month	Day	Hour
1					11				
2					12				
3					13				
4					14				
5					15				
6					16				
7					17				
8					18				
9					19				
10					20				

The following named Jurors were not summoned for the reasons stated below:
Diego Garza, Unable to Locate;; Adela Bazan Unable to Locate;;
Alicia Garza Unable to Locate;; Alfredo Garza, out of the State

All of which I certify to be correct.
Witness my hand this the 16 day of March A. D. 19 72

Claudio Castaneda Sheriff.
By S/C Compton Deputy. Hidalgo County, Texas.

BEST COPY AVAILABLE

[1]

REPORTER'S TRANSCRIPT OF PROCEEDINGS
OF JUNE 28, 1974

(Caption Omitted)

APPEARANCES

For the Petitioner: David G. Hall, Esq.
James S. Hale, Esq.

For the Respondent: Oscar B. McInnis, Esq.

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1:30 p.m.

The Court: All right, I will call this Civil Action 74-B-50, Rodrigo Partida Versus Claudio Castaneda, Sheriff of Hidalgo County, on writ of habeas corpus.

May I inquire how long you think this hearing will last?

Mr. Hall: Your Honor, I don't think it will take too long.

How many witnesses will you have?

Mr. McInnis: We have one witness that will probably take 15 minutes.

The Court: All right. I have been checking on this thing and I don't know if you all are familiar with the Davis case that was just passed by the Supreme Court.

Mr. Hall: Davis Versus United States.

The Court: And I was trying to—in fact that is what I have my law clerk doing now, getting me the Federal Rule to compare it with the Code of Criminal Procedure, 27 is it, 19, because that might end this case. If there is no question that this man filed his motion attacking the grand jury that indicted him some three or four months after he had been convicted, and if the Davis case controls, that might end this case.

Mr. Hall: Your Honor, to get in the law here immediately, initially, couple reasons why I don't feel like

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Davis does control.

First of all, Davis involves a guilty plea and this was a trial before a jury. And the Court in both Davis and its companion case, Tollett Versus Henderson, went at some pain to express its concern for the guilty plea as being a waiver of all kinds of constitutional rights, including that one of challenging the grand jury. And its does not really have any applicability and the high Court has not spoken to that question except through Faye Versus Noia which establishes a general collateral attack through or waiver standards in Federal Court. That one thing.

Secondly, Coleman Versus Alabama which is Supreme Court of about five or six years ago, lays down the rule that when the State's highest Appellate Court does not see fit to dismiss the defendant on waiver grounds and rules on the merits, then the Federal Courts themselves on collateral attack or on direct review are not going to

apply the doctrines of waiver. If the State doesn't feel like it is important enough to dismiss him on waivers then the Federal Courts wouldn't either.

And I will have the citation for the Clerk if you would like, but that case, I think, takes us out of the Court of Criminal Appeals.

I think under the doctrine of Coleman Versus Alabama, regardless of what the Federal standards may be,

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that we don't have problems of waiver.

The Court: All right, put on your first witness.

Mr. Hall: Your Honor, if it please the Court, before we start I would like to introduce a couple of law clerks that are helping me this summer, Merrily Moore and Roger Reed, and request permission of the Court to—they are the only ones that can find their ways through my files.

The Court: Sure.

Mr. Hall: Your Honor, I realize that the Court has set this as an evidentiary hearing, but at the outset I would like to raise a question concerning the availability of an additional evidentiary hearing at the request of the State. I would like to call the Court's attention to some authority in the Fifth Circuit, Brown Versus Tate, which is the only thing that I can find.

This is a fairly unique sort of a situation where it is not the petitioners that is requesting a re-litigation of

factual issues but it is the State of Texas. We had what I considered on behalf of my client to be a full and fair hearing before Judge Alamia on the motion for new trial, and then our petition for habeas corpus we plead in there that there is no longer a necessity for an additional hearing on this matter, evidentiary hearing. That is one thing.

The other day when we started, when we were getting ready for this thing, I talked to Mr. McInnis about whether

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there was any statutory authority for an evidentiary hearing on the request of the State, and we took a look at 5154(D) which sets out those presumptions or those circumstances that the Court is familiar with, I'm sure, those seven or eight circumstances under which a petitioner could have an evidentiary hearing. And there is really no provision in there for the State to have an evidentiary hearing at its request.

And thirdly—

The Court: That is under the State rule?

Mr. Hall: No, Your Honor. That is under the habeas corpus, 28 U.S. 5154(D), that subsection D which is—2154, subsection B.

The Court: Yes.

Mr. Hall: And finally, Your Honor—

The Court: 2254.

Mr. Hall: 2254, right. I stand corrected.

Finally, Your Honor, there is another—

The Court: Well, I don't care what the statute says. I run this Court and I am going to give them a hearing.

Mr. Hall: Very well.

The Court: So don't argue that point anymore. You think you have something on it, take me upstairs. I'm giving them all the hearing they need.

Mr. Hall: Very well, Your Honor.

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The Court: I first ruled that this man has no case but then he found that case by the Fifth Circuit, but I don't think that is good law either. So we are going to go forward.

Mr. Hall: Very well.

The Court: Yes.

Mr. Hall: So mark this as Petitioner's Exhibit 1.

(Petitioner's Exhibit Number 1 marked for identification.)

The Court: Were you able to get me anymore statistics on how many of the jury commissioners were, you know,

for five jury commissions, grand jury commissions, how many were from Mexican surname and how many were not? And of those that were selected, I think the jury commission selects what is it, 18?

Mr. Hall: Twenty.

Mr. McInnis: Twenty.

The Court: Twenty. All right, and then 12 serve?

Mr. Hall: That's correct.

The Court: And nobody asks to be excused, I guess the first 12 are the ones.

Mr. Hall: That is more by custom and practice than anything else.

The Court: All right. They start talking about

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I want to be excused, and Pancho Garcia says I don't speak English very well and I want to get out, so off he goes. All they need is 12. So the Judge doesn't fool around, and anybody wants to get excused they excuse them.

Isn't that what happens?

Mr. Hall: Well, the statute merely provides that 20 people be selected by the commissioners and then those people will report to the Judge and he examines their qualifications and chooses 12.

The Court: Does he choose 12? Does the statute say that?

Mr. Hall: Right. He chooses the 12, and I think what really happens—

The Court: Because under our rules here, see, I call, say, 35 names, I can only use 23, and if nobody asks for an excuse, I take the first 23, see. I don't choose. I go by the way they are drawn.

Mr. Hall: I think that is probably custom.

I recall a Supreme Court decision that talks about the Texas procedure and how it operates, but what I think it really amounts to they follow—

The Court: But does the statute?

Mr. Hall: I believe the statute just refers to the—

The Court: How do you all do it, Mr. McInnis? Do

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you know? Suppose a grand jury commission make a list of 20 names and they are in order, I guess.

Mr. McInnis: Right.

The Court: Suppose all 20 report?

Mr. McInnis: The Judge takes the first—

The Court: And nobody asks for an excuse, can the Judge excuse—pick and choose?

Mr. McInnis: He doesn't pick and choose. He takes the first 12.

The Court: He takes the first 12?

Mr. McInnis: We are going to put on a little testimony regarding this matter, if the Court please.

Mr. Hall: Your Honor, as I recall, that is a matter of practice or custom and not by statutory direction. But I think universally that is the process that is followed.

The Court: You told me that he chose, see. But to me that means picking the 20th name and 17th name and the ninth name, you know.

Mr. Hall: Right.

The Court: That is not the case?

Mr. Hall: There is a case, Your Honor, and I think it went before the Supreme Court and I can't recall the style of it now where that objection was raised, that they always putting the Black grand juror—they put one token Black on the jury—I think it was in Dallas—and

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he was always number 20 on the list, and so they would never get to number 20 because the practice was to always take the first 12 that were qualified.

But the Judge goes through and qualifies these people, and the custom is the first 12.

At this time, Your Honor, I would like to introduce—I have given a copy of this to Mr. McInnis, introduce—Petitioner's Exhibit Number 1 was an affidavit by the attorney who represented him at the trial of this cause, Mr. Joe Cardenas. This is supplemental in many respects to the affidavit that is attached to his motion for new trial. I added some additional language to it after talking to Mr. Cardenas yesterday to meet some questions raised in apparently recent Fifth Circuit decision.

The second thing I want to introduce, Your Honor, if that be necessary—

Mr. McInnis: Just a minute. Before you get—

The Court: All right.

Mr. McInnis: If the Court please, I have agreed and make no objection to the introduction of the affidavit. However, I did expect him to have the witness here and I intended to ask him some questions concerning his qualifications, and in view of the fact that he isn't here—

The Court: Is that Mr. Cardenas?

Mr. McInnis: Mr. Cardenas. We have agreed and

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stipulated, short stipulation, if the Court please, and with the Court's permission I would like to add it is agreed and stipulated between petitioner and respondent that Mr. Cardenas is a practicing attorney in the State of Texas, that he has been a practicing attorney for at least 10 years, that he is a graduate of a recognized law school, that he

worked in the District Attorney's Office of Hidalgo County for a period of two or three years shortly after being licensed to practice law, that he practices both criminal and civil law in Weslaco, Texas, and that he practices in both State and in this Honorable Court and has done so for several years.

Mr. Hall: Yes, so stipulate.

The Court: Yes. All right.

Mr. Hall: Second thing we are introducing, Your Honor, is the transcript of the proceedings in the State Court. This will be the entire trial transcript.

The Court: Now, I don't want to burden this record with anything that is not—you are not attacking anything in this case other than the composition of the grand jury?

Mr. Hall: That's correct, Your Honor.

The Court: All right. And does that contain the—I think I already have the portion where Judge Alamia had the hearing. That is already before me, isn't it?

Mr. Hall: This is the official record and trans-

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cript, Your Honor, of course.

The Court: But that is the whole case, wasn't it, that was appealed?

Mr. Hall: Right. This includes the Statement of Facts

and everything in the whole appeal, in the whole case. This is the record that went up before the Court of Criminal Appeals. The part that is relevant to this is the last part of it that concludes as motion for new trial, amended motion for new trial, and pleadings on that, together with all of the statistics in support of the complaint regarding grand jury composition, and that is all included in the transcript here.

The Court: That is actually the portion that you want to introduce?

Mr. Hall: That's correct, but since it is all bound together I don't know how to separate it and introduce these and that, so it is in two parts, including the appellate briefs.

The Court: I will admit it.

(Petitioner's Exhibit Number 2 marked and received in evidence.)

Mr. Hall: Now then, Your Honor, as I understand it I have a burden to show on behalf of Mr. Partida that the grand jury that indicted him was not properly representative of an identifiable, cognizable class, and I would like at

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this time to call the Court's attention to what is in this record before turning the field over to Mr. McInnis.

The Court: May I call your attention to a case that was cited by the Fifth Circuit just on April 12th? I don't

know whether you are familiar with it. It is Greich versus Wainwright.

Mr. Hall: Correct, Your Honor.

The Court: Those were cited on April 12th. And there the Court held, you know, that litigant is not entitled to a jury which mirrors composition, ethnic or religious group in the community wherein he resided but is merely entitled to a jury which is fairly selected.

Mr. Hall: That's correct.

The Court: In other words, I can have a Mexican tried here in my Court with a jury composed of nothing but gringos or a gringo tried with jury composed of nothing but Mexicans and they can't complain as long as the method of selecting the jury doesn't exclude either one from the jury.

Which is a fact here in this Court. Any panel that I have here always, I think, mirrors the percentage of the people in this area. I would imagine that at least 70 percent of my jurors are Mexican descent but a man might be tried with a jury of nothing but Anglos or nothing but Mexican-Americans. And if that's the case he can't complain.

Mr. Hall: That's correct.

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The Court: As long as the jury that those came from was fairly selected.

And that is what this case seems to make reference to.

Mr. Hall: That language in Greich comes from Swain Versus Alabama and it is directly cited language. The magic phrase, I suppose, that a jury, be it grand or trial —

The Court: For my purpose it is a fact that the Fifth Circuit chose again to use that language as late as April 12th of 1974.

Mr. Hall: That language has been repeatedly used since 1967 or whenever it was first — when Swain was decided.

Swain Versus Alabama, Your Honor, was a petit jury case that was challenging the practice of the District Attorney of using his peremptory challenges from a Black —couldn't have substantial Black population—to strike off all the Blacks on the jury panel so none ever got to sit on the jury. It was not the kind of situation that we have here where we are attacking the pool from which the jurors are selected. The Swain language that a jury, be it trial or a petit, does not have to reflect a mirror image of the community's population, means exactly that.

And I don't dissent from that. But what we have

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here is a funny kind of mirror. It is one of those mirrors that you find in the funny house that makes skinny people look fat and fat people look skinny. We have a situation in a County of 71.1 Mexican-Americans over a 10-year

period only 39 percent of jury panels have been comprised of Mexican-Americans.

The Court: Have you taken into consideration the thousands of resident aliens that live in that community, or wetbacks that are counted in the census that wouldn't be eligible to serve. The thousands that say they don't know how to read or write or speak English? You know that to exist.

Mr. Hall: Your Honor, what the problem is here is that the cases say -- we have to look at the population of the jurisdiction as a whole. We have to examine that population to see whether there is an identifiable class such as Blacks or Mexican-Americans. We have to determine whether or not that class is subject to discrimination which the statistics, bulk of the statistics before the Court and record now —

The Court: Well, isn't it a fact, too, that many of the grand jurors in Hidalgo County, say the last 10 years, many of those grand juries have had on many occasions more Mexican-Americans on the grand jury than Anglos?

Mr. Hall: Not many. A few have. There have been

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a few where it has been more or less balanced. That record is in there as an exhibit. But even so, even if it were 50 percent it would still be a 30 percent disparity, and the Fifth Circuit and the Supreme Court have said that when —

The Court: Just a minute. My law clerk here just called my attention to the fact that when you said, Mr. Hall, that the burden was on you, well, says you just show a discrepancy which I think you have shown.

Mr. Hall: Yes, Your Honor.

The Court: And then the burden shifts to the State.

Mr. Hall: That's correct.

The Court: And I shouldn't put the burden on you to show me about the aliens, resident aliens, illegal aliens, people that can't read or write English or speak English. And he is right on that, and that is what I held, that is why I reversed myself here, and I said that you had made the point and that then it became incumbent upon the State under this Muniz case out of El Paso for them to go forward. So that is the reason that I asked Mr. McInnis to go forward.

Mr. Hall: I just wanted to make sure that the Court was satisfied with the prima facie case.

The Court: I am satisfied that you have made a point.

Mr. Hall: Okay. I was going to try to shift that

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burden as soon as I could, but we did want to establish the point here today that we had proven this prima facie case.

The Court: I think I already held that in my granting you the re-hearing here.

Mr. Hall: Very well, Your Honor. Then at this time we will rest on the proof that exists in the record.

The Court: Yes.

Mr. McInnis: May it please the Court, for the purposes of the record we would like to introduce as the State's first exhibit the answer which we filed, and it had attached to it, I think, the authority by which we are holding the defendant. And with the Court's permission I will get it out a little later and let the Clerk mark it, if I may.

The Court: All right. You are going to make it available to them, or they already have it?

Mr. McInnis: Yes sir, they have — you have a copy of that?

The Court: Do you have a copy?

Mr. Hall: Yes, I have a copy.

The Court: Yes. All right.

Mr. McInnis: And I would like to call Judge Alamia.

The Court: All right, Judge.

You want to waive the oath on the Judge?

Mr. Hall: I believe the Judge will tell the truth.

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J O S E A L A M I A, called as a witness by the State, the oath having been waived, testified as follows:

DIRECT EXAMINATION

BY MR. McINNIS:

Q. State your name, please, sir.

A. Jose Alamia.

Q. And you are also known as J. R. Alamia, are you not?

A. That's right.

Q. And you are Judge of the 92nd District Court of Hidalgo County, Texas?

A. That's correct.

Q. Judge, how long have you been a Judge of that Court?

A. Since November 12th, 1969.

Q. And I believe until recently the 92nd District Court was the only Court that impaneled grand juries in Hidalgo County, was it not?

A. That's correct.

Q. Do you know about when it was that the other Courts commenced inmpaneling grand juries in our County?

A. Sometime, oh, prior to September '72. It is conceivable that it could have been as early as the early part of '73.

Q. All right, sir. But in March 1972, that term of

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Court at which this particular defendant was indicted,

I believe your Court was the only Court that impaneled grand juries, was it not?

A. That is true.

Q. And had been thus for several years?

A. Yes sir. As far back as I can remember.

Q. Yes sir. Now, of course we use the grand jury commissioner system of selecting grand juries in Texas, is that correct, sir?

A. That is right.

Q. And I believe that the law provides that the presiding Judge shall select not less than three nor more than five grand jury commissioners to select a grand jury, is that correct, sir?

A. That's correct.

Q. And you as Judge of the 92nd District Court have and do appoint the grand jury commissioners who select the grand jurors for your Court, do you not, sir?

A. Yes.

Q. How are the grand jury commissioners selected?

A. Well, the practice that I use I try to think of names of people that I know in the County, and I select one man from each commissioner's precinct, and then the fifth one usually comes from the more populated area such as McAllen and Edinburg.

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Q. All right, sir. And you ordinarily then select five commissioners, the maximum which the law permits?

A. Yes. I started out with three because ordinarily that was — well, that is what I understood to be the practice, but then I went from three to four and then to five.

Q. And do you have any practice at this time and have you had any practice in the past as to the number of people that you put on your grand jury commission with Mexican-American backgrounds or ethnic origins?

A. Yes.

Q. And what practice do you use? Out of these five how many do you ordinarily appoint who have a background of Mexican-American?

A. I try to appoint the greater percentage of Mexican-Americans. Since I have been appointing five I usually appoint three Mexican-Americans and the other two either might be Anglo with Anglo names or on occasions I have selected the fifth one as a colored man.

Q. All right, sir. And are there any particular instructions that you give the grand jury commissioners with reference to their selecting the grand jurors who are to actually serve?

A. Generally the instructions that I give them I put them under oath and then I qualify them and I give them lists of those people which are made available by the Clerk by the

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way, those people that have served in the past year. Usually we hand them the whole big bound volume of names that have served on grand juries for years back.

The Court: What is the purpose of that, Judge? To keep them off of another grand jury or to tell them those that are already qualified and have experience, or what?

A. The purpose of that is that the law requires that you select grand jurors who have not served the past year.

The Court: The past year or years?

A. The past year for one year back before.

The Court: But you give them a list of names of not only the past one year but four or five years back?

A. Yes. We give them that because it is bound, the list is bound. But they don't need but one year's list of names.

The Court: All right.

A. And then after I do that I tell them that they have been selected geographically. I instruct them as to what the qualifications of a grand juror are, and the disqualifications.

The Court: Judge, do you all make a record, is it transcribed, what you tell the grand jury commissioners?

A. No sir.

The Court: You don't have a Reporter there, do you?

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A. No, I do not.

The Court: What you actually told the grand jury that indicted this boy is not available to us?

A. No sir.

I then tell them about the exemptions that the law provides for. I also advise them that exemptions, the fact that people are exempt, do not mean that they are dis-

qualified from serving on the jury. I just merely pointed it out to them so that in the event that they want to consider that, why, they can do so.

I forgot to tell you that in composing the grand jury commission I usually appoint a woman also on that grand jury commission, be she a Mexican-American or Anglo. I usually have at least one woman. Lately I have also tried to appoint people between the ages of 18 and 25. Someone to represent the younger group.

The Court: Better not say you are going to limit it to one woman because you are going to have the gals on your neck.

The Witness: I realize that.

The Court: Next time I have a woman defendant here they will say —

The Witness: I realize that, Judge, but my experience has been that that woman gets her way and we end up with four or five female grand jurors. How I don't know.

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But that has been our experience. And then I will tell them to go ahead and make their selections of 20 people.

Q. All right. And they do select 20 people, do they not?

A. Yes sir.

Q. Those are sealed and filed with the District Clerk until such time as you order that they be opened and notified to appear?

A. And the District Clerks, including all of them, including the deputies, take an oath to that effect.

The Court: That the names are not to be divulged until —

A. Until the Court orders the grand jury to appear.

Q. Now, using this system, did you select the grand jury commissioners for the March 1972 term which I think the record reflects is the term of grand jury that indicted this defendant?

A. Yes sir, I did.

Q. And I don't know whether I have asked you to check or not or whether you have that available with you, but do you know from the record, or if you have it available, give it to us for the record, how many people, persons with Mexican-American names, were selected to serve on the grand jury commission that selected the grand jury that indicted the defendant?

[23]

A. Yes sir.

Q. And how many were there?

A. There were three.

The Court: Do I have that record before me?

Mr. Hall: Which one is that?

The Court: Who were the people that you selected as commissioners?

A. All right, for the March term, Carlos Guerra of Weslaco. He is an insurance man. Clarence Davis of McAllen. He is a CPA. Oscar Garza of Edinburg. He is

a rancher. Hermanlinda Benavides, wife of a businessman in McAllen. And Marion Carlson of Edinburg.

They composed the five people that were appointed on this grand jury commission for the March term 1972.

The Court: And that one you had three of them?

A. Three out of five, that's correct.

Q. And do you have the list with you of the March 1972 grand jury that actually served which was selected by this —

The Court: If he has can you give us the 20 names that were selected by this jury commission?

A. I did not bring that with me, Judge. I have the list of the 12 that served.

The Court: Do you know if the list from which they were selected is available?

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A. It is available.

Mr. Hall: Your Honor, I should have a copy of it.

Mr. McInnis: May be in the record. It shows 10 Anglo names, 10 Mexican-American names on the 20.

The Court: Do you agree with that, Mr. Hall?

Mr. Hall: Yes sir, Your Honor. That is in the record. But we don't have the actual names. But the table indicates that there are 10 Anglo names.

The Court: Ten and 10.

Mr. McInnis: Ten and 10 were selected on the panel.

Mr. Hall: And it also indicates, Your Honor, that the grand jury that actually indicted was, I believe, five Mexican-Americans and seven Anglos.

Mr. McInnis: That's correct.

The Court: Five Mexican-Americans and seven —

Mr. McInnis: Seven Anglo names, Your Honor.

The Court: All right.

Q. Judge Alamia, there was some little discussion few minutes ago about the manner in which you select the grand jurors once you have the list, so very briefly I would like for you to tell the Court how you go about selecting them, once the 20 people are in there. I don't mean give him all instructions that you give them, but after those that

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have been excused that want off, how do you select the 12 that serve?

A. The first 12 people that qualify, and I have the Clerk read off the names, and they serve. This has been my practice all the time.

The Court: You don't choose and pick? If you like number 20 because he is your compadre, you don't put him up above the 12?

A. No sir.

Q. Judge, do you have with you — and I don't know whether you have this or not — it appears in the record some place — but the number of grand jury commissioners in the year 1972 who actually served in your Court? How many were appointed that year.

A. During 1972?

Q. If you please, if you have that information; if you don't —

A. Well, I have the January term. That was five people, three of Mexican-American names, Samuel Sanchez, Ida Martinez and Joe S. Martinez.

And the March term I have already stated.

The May term, five people. Victorianno Garcia, Lalo Cavazos, and Juanito Arredondo. Three out of five were Mexican-Americans.

And then we skipped the July term and go into

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September. We never call a grand jury during summer months.

In September I have five people. Leo James Leo, Jose Noe Gonzalez and Rodolfo Garza. Three out of five.

And then November—

The Court: Now this Leo James Leo is a Mexican.

A. Yes, sir.

The Court: He just has a gringo name.

A. That's correct.

The Court: Yes.

A. I would say English name.

The Court: Well, Anglo name, all right.

A. Yes. All right.

The Court: But Leo James Leo is as Mexican as you and I.

A. Yes.

The Court: Yes.

A. And in November—I don't think that the September term, the grand jury selected for the September term, actually served. For some reason or another we did not have need for a grand jury, and therefore for the November term—

The Court: Blackout on crime in Hidalgo County?

A. I imagine that was the reason. The District Attorney didn't indicate that he needed a grand jury and he just didn't impanel one.

The Court: All right.

[27]

A. We went into the November term, and the grand jury commission for the November term again contains

the name of Leo J. Leo and Armando Guerra. In that case there were only four people, and I do not recall why there were only four but I believe that the fifth one was not able to serve, and for that reason his name does not appear.

But there were two out of four in that case.

And that completes the year '72.

The Court: Do you have a recorded or transcribed by a Reporter the actual impaneling of a grand jury?

A. Yes sir.

The Court: So that is available to us, isn't it?

A. Yes sir.

The Court: Do you know if it can be made available to this Court, just exactly what you told the 20 people that were summoned to serve for the March term?

A. Yes sir.

The Court: And if people asked you for excuse, who the ones asking you for excuses were?

A. Yes sir.

The Court: Do you think that can be made available to us?

A. Yes sir, now with one—

The Court: You know 10 and 19, they tell me, well, it is only five and seven. Well, I want to know why these

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people were—five of the 10 Mexican names were excused, did they ask for an excuse, did they give you this business about I don't speak English or what.

The Witness: Since I have been Judge of the 92nd District Court, Judge, there has only been one occasion when a grand juror excused himself that I can remember.

The Court: Because of lack of English?

A. Yes sir. And he wasn't a Mexican-American. He was of Polish descent.

The Court: The thing is this: I want to know, you know, the proceeding of the impaneling of the grand jury that indicted this man; if it could be made available to us we could sure see what happened. Why were there only five out of 10. I want to see that if it is available.

Mr. Hall: Your Honor, the thrust of our argument, if I might clarify this a little bit, is no allegations of discrimination against Judge Alamia. What the problem that we see is in the jury pools, those lists of 20 people selected by the commissioners, our complaint is that those five people go into a room and we have no idea what goes on in there, it is secret, they come up with 965 jurors over a period of 10 years, only something less than 40 percent of which are of Mexican-Americans in the County that has an 80 percent Mexican population. And the

cases, of course, hold that wherever in the history of the selection process discrimination

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like that, apparent discrimination like that occurs, then it poisons the entire system.

The Court: Don't you think it is just as bad for Judge Alamia to testify that here is a Mexican that you must select 17 or whatever the percentage is, Mexican-Americans? Don't you think that is just as bad?

Mr. Hall: I certainly would not advocate that kind of instruction. No, I would not advocate that kind of instruction.

But would you say like in Brooks V. Beto you would have to have—one of the obligations of a commissioner is that you produce us a group of panel of grand jurors that is representative of all groups in the community, the women, as Judge Alamia indicated, Blacks, the Mexican-Americans, everybody, and that somewhere, unless there is a statistical anomaly somewhere, or discrimination, then the panels that are resulting from those kind of instructions should reflect more or less what the community demography is. And that is all we are asking. I think that kind of instruction could be given.

But what we are focusing on, Your Honor, are those panels—

The Court: Are you telling me that there has never, in Hidalgo County, never in Hidalgo County in the 20

people selected by the grand jury commission, selected more than one-

[30]

half the available grand jurors?

For instance, this case it was 10 and 10. Are you trying to tell me that there never has been a case when it was 15 and five?

Mr. Hall: The greatest number was in November of 1968—that is not right—

The Court: You have that list in there?

Mr. Hall: Right. Fifteen and five was the highest number there ever was, and that occurred once.

The Court: That I have in there?

Mr. Hall: But over the years there has never been one, a single jury, jury panel, that approached the population norm of 80 percent. Virtually all of them with very few exceptions were less than 50 percent Mexican-American composition, and that is not sufficient to get us up—

The Court: I think that, if the majority of the people, you know, like 15 and five, that might only happen once or twice or three times, but the fact that it happened shows that the system is not wrong, see, because it would never have happened if the system was otherwise, you know. Discrimination against, it would never happen, you know. And the fact that it has happened shows that the system is all right.

Mr. Hall: Your Honor, we are not in this case challenging the system. We are challenging the results of

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the system in this particular man's case, and he was indicted by a grand jury that was drawn from a pool that is 30 percent under representative of his ethnic group, and that is what we are complaining about.

The Court: That is what you are complaining about. Yes. All right.

Q. Judge Alamia, have you looked at the—of course I know he isn't complaining about this but I would like for the record to show—have you checked the jury lists or the petit jury that actually tried this defendant there in your Court? He was tried in your Court, was he not?

A. That's correct.

Q. And have you checked that jury list?

A. No, I haven't.

Q. All right.

A. I recall—well, my memory serves me correctly, I think there were seven.

Q. Seven Latin names?

A. Yes, on the jury. But I am not sure of that.

Q. I believe that is correct. Six Latin names and one lady had a Latin first name, Anglo last name?

A. That's correct.

Q. All right. And the penalty, actually the penalty in this case, was set by you, was it not, after a pre-sentence investigation?

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A. That's right.

Q. The jury did not set the sentence?

A. No sir.

Q. The penalty?

A. I set it.

Q. And petit jurors in our County, of course, are selected from the jury wheel indiscriminately, are they not?

A. That's correct.

Q. And it is now filled by the poll tax—not poll tax but registered voters?

The Court: It sure would be good if Texas goes to the Federal system, get your grand jurors and petit jurors out of the same pool. That would save a lot of problems.

Mr. McInnis: That it would.

The Court: Because I end up here with juries that might be out of balance, you know, but the way people are selected, you know, sometimes they might be out balanced one way; other times they would be out balanced the other way. But that is just a question of average. But the average would always be about the same, you know. So the system that Texas uses has been upheld for selecting grand juries. No question about that.

All right, go ahead with your interrogation.

Mr. McInnis: If the Court please, I believe that

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is about all I have.

The Court: Do you have any questions of Judge Alamia, Mr. Hall?

Mr. Hall: Just a second.

The Court: If the actual impaneling of the jury that indicted this man was of record, the transcript of that, could you make it available to the Court? I sure would appreciate it.

Mr. McInnis: If the Court please, we request that we be permitted to make a search for it, and if it is available that we have it transcribed and have it filed with the Clerk as an exhibit.

The Court: You don't have any objections to that?

Mr. Hall: Excuse me, Your Honor. I was talking to my co-counsel.

The Court: I asked him if it was at all possible to get me the transcript of the actual proceeding of the impaneling of this grand jury.

Mr. Hall: No objections.

The Court: Mr. McInnis said he is going to look for it. If it is available he is going to file it with the Clerk.

Mr. Hall: I would like the opportunity of reviewing it first.

The Court: Yes.

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Mr. Hall: We have no objection.

CROSS EXAMINATION

By Mr. Hall:

Q. Judge Alamia, you have told us what kind of instructions you give your jury commissioners, and it is true that you do attempt in your own selection of commissioners to balance the ticket, if you will, is that correct? Did I understand your testimony?

A. That's correct.

Q. You normally try to get at least three Mexican-Americans and you try to geographically balance it, is that correct?

A. That's correct.

Q. And frequently try to have a woman, occasionally a Black person to your commission, and recently 18 to 25-year olds?

Now, what is the purpose of doing that, Judge Alamia?

A. Well, I think it is more representative of the people that we deal with in Court.

Q. Okay. Now, do you give any instructions whatsoever to your commissioners, once they are selected, to have them balance the tickets the same way?

A. No sir.

[35]

Q. Now, why do you not do that?

A. I never have felt that that was necessary in Hidalgo County, Mr. Hall.

Q. Now, Judge, you are familiar with all these statistics that have been introduced in the Court this afternoon, is that correct?

A. Yes.

Q. We had a hearing in your Court—

A. I am familiar with them but I do not recall just what the statistics show.

Q. Well, do you recall what is labelled as Exhibit "A" in the transcript—

Mr. Hall: Your Honor, this is a copy of the transcript; it is not exactly the same as the one before the Court, not numbered the same, but it is in that.

The Court: All right. Do you recall that?

A. I recall having seen it but I do not recall it as such.

The Court: Exact figures. All right.

A. I remember that he introduced it.

Q. All right. You do recall that this was a certified copy of records from the District Clerk's Office, that one of the Assistant Deputies, one of the Deputy Clerks, reviewed and reviewed all your lists of grand juries drawn not only from the time that you have been appointing grand

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juries but as far back as 1962?

A. Mr. Hall, I do not recall how it was introduced or who testified to it, to tell you the truth. I remember that you presented it, but I don't know how, where it came from.

Q. Okay. It has been some time?

A. Yes sir.

Q. You do not quarrel with the accuracy of these figures, however?

A. I have no way of quarreling with them.

Q. All right. Does it surprise you at all to learn that only 39 percent of the grand jurors, members of the venire panel, are members of Mexican-American descent?

The Court: Of those that actually served or were called?

Mr. Hall: Members of the panel, chosen.

The Court: Called and served?

Mr. Hall: Not the ones that served; the ones called.

The Witness: Does it surprise me?

Q. Does that surprise you?

A. What period of time do they cover?

Q. We are talking from January of 1962, January term 1962, until March of 1972, which was the grand jury that indicted Partida.

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A. Well, I guess it would surprise me except that I have been surprised at other times. For instance, there is

one time that I thought we ought to have members of the news media on the grand jury, and I think I appointed two members of the news media on the grand jury commission, but I ended up with no members of the news media on the grand jury.

The Court: Surprised you?

Q. Maybe it was professional jealousy.
A. I really don't know.

Mr. Hall: Well, the question I have, of course, Your Honor, is that over an extended period of time, talking about 900 and—excuse me—870 people that have been chosen—

The Court: But that was since 1962.

Mr. Hall: That's right.

The Court: Lots of changes happened since 1962. The whole complex of this area has changed in the last 12 years. I think a more fair comparison would be one from, say, five years back.

Mr. Hall: Very well.

The Court: Been a lot of changes in the last five or six years.

Mr. Hall: I haven't calculated—

The Court: Judge Alamia wasn't selecting the grand

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jury commission then.

Mr. Hall: I calculated that, Your Honor, from the time —Judge Alamia, you went on the Bench in January of 1970?

A. November of '69.
Q. November '69. Okay. So the first jury that served that was called in your Court would have been one for—

The Court: January of '70?

A. That's correct.

Mr. Hall: January '70. I calculated those figures, Your Honor, and the Court could do so also because they are all in the record.

The Court: You calculated them? Give them to me.

Mr. Hall: It is 45 and something percent of the panel.

The Court: Getting better.

Mr. Hall: It has gotten 60 percent better.

The Court: Yes.

Mr. Hall: And it has closed the gap by that.

The Court: And after this suit by you might even get better.

Mr. Hall: It might, Your Honor. We hope so.

Q. But, Judge Alamia, you will recognize that the

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results of this selection process that has been going on in Hidalgo County for these number of years, wherever you want to cut it, has not resulted in grand jury panels that are representative of the ethnic balance in the community?

A. You mean population wise?

Q. That's correct.

A. No, I believe that's correct.

Mr. Hall: I have no further questions, Your Honor.

The Court: You know when we reviewed this thing back here we made some calculations ourselves, you know, and one of the things that worried me at the time was the fact that when this jury selection process takes place in Hidalgo County things get worse. Start out with, say, 60 percent of the jury commission being Mexican-Americans, but then when you go to selecting a jury panel that the jury is selected from, it dropped down to a 55 deal. And then from those that actually serve, you know, it goes down to about 43 percent.

For instance, out of 12, five out of 12, something like that. And it would be very interesting for some student that is working on his Master's, you know, or doctorate to find out why the progressively getting worse.

I think you are going to find out that it is because of people themselves, Mexican-American descent, wanting to exclude themselves from the process, you know. Some

of them the women, you know, Mexican-American women, usually don't

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want to have anything to do with Court. They get scared, want to get out with any excuse that they can use; having children and all that. They want to get out of any business like this. They don't like it.

I know from personal experience. If my mother had ever been called—it's a good thing they didn't have women on juries then—if my mother had ever been called to a jury she would have died.

It would be interesting to know, you know, why, why. Is it because of econo[illegible] background of some of our people that might be selected? They are so needed at the jobs they are afraid to lose their job if they stay away and serve on a grand jury or jury. It would be very interesting to find out why, why this happened, you know.

I don't believe that it is because of any determined discrimination on the part of anyone. I think it has other social and economic reasons for it. I don't think that it is a determined thing.

It does look funny to me, you know, that at sometime or another some grand jury in Hidalgo County should have 12 Mexican-Americans. You know law of averages would dictate that, see. Never has happened. I don't think you ever had one with nine, 10, see.

Looks very funny to me that those things don't happen once in a while, you know. Ought to. By God, the law

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of average dictates it.

So maybe these people have something in their complaint here. I don't know what the answer is.

But the law is evolving gradually in this area, and I think that Davis decision might have something to do with this case, and I will have to look into it. I haven't had a chance to read this. I just glanced through it, this last supplemental brief that Mr. McInnis filed.

Mr. Hall: Correct. I just got a copy of it.

The Court: It goes into this question of this waiver.

Mr. McInnis: We didn't mention Davis although we found it in the Criminal Law Reporter, and the reason we didn't, we thought the facts were different; he pled guilty.

The Court: I don't think the Supreme Court makes that distinction.

Mr. McInnis: Maybe they didn't, but I thought they made some distinction.

The Court: I don't think they made that distinction.

There has to be finality. That is one of the greatest problems we are having in the law today. Nothing is ever final. Something ought to be final. A case ought to end somewhere sometime, see, this continuous process, you know, I think it was Judge Campbell, a retired senior Judge from

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the Northern District of Illinois, wrote an article, you know, how a defendant now gets about eight or nine bites at the apple, you know. A never-ending proposition.

Mr. McInnis: If the Court please, I have no more questions as to Judge Alamia.

The Court: I don't think you have either.

Mr. Hall: No.

The Witness: Judge, I may want to say something in connection with what you stated, and I do want to correct my testimony in one respect.

The Court: All right.

The Witness: I selected the grand jury commission that served for the November term in '69. I stated that I started in January, but actually I selected the grand jury commission that served in November. And they selected the grand jury for November term. And there were nine Mexican-Americans on that grand jury.

The Court: On that grand jury?

A. Yes sir. And I haven't checked the others to see what percentage, but on that one there were.

The Court: And your first grand jury that you selected, had anything to do with selecting the grand jury commissioners, and out of the grand jury that actually served there were nine?

A. Yes sir. And there were only two — well, there

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were three Mexican-Americans — well, there were four commissioners, and out of those four three were Mexican-Americans.

The Court: And you ended up with a grand jury of nine and three?

A. Of nine, yes sir.

The Court: That was quite a departure from the past, I'll bet you.

A. Yes sir.

The Court: Yes.

Mr. McInnis: That is all I have to offer the Court.

Mr. Hall: That is all I have.

The Court: Step down.

(Witness excused)

—o—

The Court: I would love to have the transcript of what happened.

Mr. McInnis: Yes.

The Court: I want to see just what happens when a State District Judge go to impanel a grand jury. Might

be that will give us some indication of what excuses people use. And if that can be made available to me I sure would appreciate it.

Mr. McInnis: We will certainly get it for the

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Court if it is available.

The Court: All right.

And have you all filed all the briefs that you care to file?

Mr. McInnis: Yes sir.

Mr. Hall: Your Honor, I would like to have leave to file another brief, and it won't take me but about two days.

The Court: Will you address yourself to this Davis case?

Mr. Hall: At length. Sure will

Mr. McInnis: What is the citation?

The Court: I am going to be leaving on vacation on the 5th of July. I finally was able to get me a Judge out of Miami to come down here and try some cases for me. So I am going to be able to take off for a few days. So I don't intend to work on this thing until after I come back.

Mr. Hall: When will you be back, Your Honor?

The Court: I should be back some time around the 10th of August.

Mr. Hall: I will file a brief by then.

The Court: All right.

Why don't we set the filing of anymore things that you all want to by the 12th of August.

Is that all right with you, Mr. McInnis?

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Mr. McInnis: That is all right. I don't know that I will file anything else. I might if he comes up with anything. I think I know about the Davis case.

The Court: If you file yours, say, by the 5th of August, if he wants to file anything he will file it by the 12th.

Mr. Hall: Sure.

The Court: And if you can find this other transcript, I sure would love to have it.

Mr. Hall: This is one other item, Your Honor. If the Court will recall on that second order there was a recommendation that the releasement of Partida on bond while this thing was pending. Judge Mallet and I got into some legal theory by the thing and came to the conclusion it was impossible until we got Mr. Partida here physically present and in custody of the Court so this Court could release him. He was a State prisoner up until this time, and we felt like now that there was an authority for this Court to release him on bond as the Court had recommended.

The Court: Was this man out on bond during his trial?

Mr. Hall: Yes, Your Honor, he was out on bond through the appeal and everything else until the mandate came down. We got him locked up so we could file our petition for habeas corpus, and he has been locked up since then.

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The Court: I don't remember anything about this man. Does he have a previous record?

Mr. Hall: Yes, Your Honor. He has a previous record but he was out on a $5,000 bond. I found him to be extremely reliable, Your Honor. He reported to me —

The Court: What kind of bond was he out under? Personal surety?

Mr. Hall: Personal surety bond.

The Court: Do you object to this man —

Mr. McInnis: We haven't objected to him making a $5,000 bond during the pendency of this proceeding. We have no objection. He doesn't have any bond right now, and if the Court order said either release him on his present bond or let him make a new bond one, but I feel that is —

The Court: Is his bond still in effect?

Mr. McInnis: I don't think so. I feel that they are released whenever the mandate of the Court of Criminal

Appeals is returned and he is taken into custody and he has no bond.

Mr. Hall: We talked to Judge Alamia, I think, and Judge Alamia felt like he didn't have jurisdiction anymore since it was a matter from the Court of Criminal Appeals. But now this Court does have jurisdiction.

The Court: All right. Where does he make his bond? With my Magistrate?

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Mr. Hall: Right.

The Court: I guess so.

Mr. Hall: We turned in the bond.

The Court: Sheriff Castaneda says, well, I don't have any — all right, I am going to order that this man, pending the outcome of this case and any appeal therefrom, be released on a $5,000 cash or surety bond, to be accepted by the United States Magistrate for the Brownsville Division of this Court, and upon the making of that bond that the U. S. Magistrate advise Sheriff Castaneda that this man has made such bond and he shall be released.

But don't you release him until my U. S. Magistrate, Judge Mallet, tells you that he has made a bond.

All right. We will do that.

Mr. Hall: Thank you, Your Honor.

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In The United States District Court §
For The Southern District Of Texas §

I, Lloyd E. Horn, Official Court Reporter, United States District Court, Southern District of Texas, do hereby certify that I reported the proceedings had in the above styled and numbered cause, on the 28th day of June, A.D. 1974; that said proceedings were later reduced to typewriting under my personal supervision, and the above and foregoing 47 pages of typewriting constitute a true and correct transcript thereof.

Given under my official hand, this the 22nd day of November, A.D. 1974.

LLOYD E. HORN
Lloyd E. Horn
Official Court Reporter

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CERTIFICATE OF SERVICE

I, THOMAS PARKER BEERY, a member of the Bar of the Supreme Court of the United States, do hereby certify that three (3) copies of the foregoing have been served on Respondent by depositing same with the United States Postal Service, Certified Mail, postage prepaid, addressed as follows: David G. Hall, Law Offices of Texas Rural Legal Aid, Inc., 103 E. Third, Weslaco, Texas 78596, on this the ____ day of July, 1976.

THOMAS PARKER BEERY
Assistant Criminal District Attorney
Hidalgo County, Texas